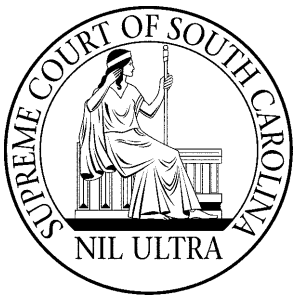

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 16, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Grays Hill Baptist Church, Petitioner,

v.

Beaufort County, and The Beaufort County Zoning Board of Appeals, Defendants,

and

The United States of America, Defendant-Intervenor,

Of which Beaufort County and The United States of America are the Respondents.

Appellate Case No. 2019-001201

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 27995
Heard May 20, 2020 – Filed September 16, 2020

REVERSED

H. Fred Kuhn, Jr., of Moss Kuhn & Fleming, P.A., of Beaufort, for Petitioner Grays Hill Baptist Church.

Mary Bass Lohr and Catherine L. Floeder, both of Howell Gibson & Hughes, P.A., of Beaufort, for Respondent Beaufort County.

Assistant United States Attorney Lee Ellis Berlinsky, of Charleston, for Respondent The United States of America.

JUSTICE HEARN: This appeal arises from Beaufort County's refusal to issue Grays Hill Baptist Church a construction permit to build a fellowship hall adjacent to its existing sanctuary. The court of appeals reversed the master's order and reinstated the Beaufort County Planning Commission's decision to deny the permit because the Church's 1997 development permit did not include the fellowship hall and had expired. We reverse the decision of the court of appeals and order Beaufort County to issue the Church a construction permit for the fellowship hall under its original 1997 development permit.

FACTUAL/PROCEDURAL BACKGROUND

Grays Hill Baptist Church is located on a parcel of property consisting of 9.35 acres in Beaufort County, South Carolina. In December 1996, the Church applied to the County for a permit to develop its property in accordance with a development plat, which depicted two buildings—the church and a fellowship hall—the latter of which is the building at issue in this appeal. The application for the permit contained a narrative describing the development of a 15,872 square foot church and an additional 11,250 square foot building south of the church, as well as the infrastructure to support both buildings. The Church received the development permit in January 1997, which provided, "All permits expire two (2) years from the date of approval *unless substantial improvement has occurred* or final subdivision plat has been recorded." (emphasis added).

One month later, the County issued the Church a construction permit to build the proposed church. In December 1997, the Church completed construction of all improvements shown in the development plat except for the fellowship hall. The improvements included the church building and all of the parking, paving, and infrastructure for both buildings. The Church did not construct the fellowship hall

then due to financial constraints. The County issued the Church a certificate of compliance, which allowed the building to be occupied.

In December 2006, the Beaufort County Council adopted an ordinance creating an airport overlay district, which encompassed all lands located near the Marine Corps Air Station, and set forth certain land use limitations and restrictions. After the ordinance's enactment, the Church's property was rezoned as a "place of assembly and worship" and became a "nonconforming use" subject to an expansion limitation of up to 15% of the disturbed area, provided the expansion did not increase the occupant load of the site.[1] Shortly thereafter, the Church requested a construction permit to complete development of its property and build the fellowship hall. The County refused to issue the permit and instead directed the Church to seek a zoning variance[2] and to apply for a new development permit.

As the County instructed, the Church applied for a new development permit and met with the County's Development Review Team (DRT). The DRT reviewed the Church's application and plat, and relying on the airport overlay district ordinance, denied the request for a new permit based on a finding that the proposed fellowship hall could increase the occupant load of the property. The Church appealed to the Beaufort County Planning Commission, which affirmed the DRT's decision not to issue the permit. The Commission found the Church's original master plan had both a church and fellowship hall planned. However, the Commission held the permit application divided the project into two phases and sought only to construct a 15,872 square foot building. The Commission also determined that all construction requested in the initial development was completed in 1997, and no request to build the fellowship hall was made until 2007. In addition, the Commission agreed with the DRT's finding that construction of the fellowship hall could increase the occupant load of the property in violation of the ordinance. At

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[1] The ordinance was later amended in February 2008 to provide that nonconforming places of assembly and worship may be expanded up to 15% *of the existing floor area*, and that only minor expansions to accommodate bathrooms, storage space, kitchens, and office space may be permitted.

[2] The Church applied for a variance and appealed the Zoning Board's decision denying its request to the court of appeals. However, the Church is no longer challenging this decision, and it is not before this Court.

the hearing, the Church explained that the fellowship hall would not be occupied while church services were being held in the sanctuary and vice-versa.[3] Currently, the sanctuary is outfitted with folding chairs so that when the Church holds an activity other than services, the chairs can be folded and tables can be set up. Once the fellowship hall is built, it would be used only for activities, such as a dinner or social function, and permanent pews would be installed in the sanctuary for worship services. The Church even offered to stipulate that use of the two buildings would be mutually exclusive. Nevertheless, the Commission concluded the number of persons that might be on the site at any one time could increase if the fellowship hall were allowed to be constructed.

The master-in-equity[4] reversed, holding the Planning Commission committed an error of law when it affirmed the DRT's decision not to honor the Church's original 1997 development permit and instead required the Church to apply for a new development permit.[5] Although the Commission found the original master plan had both a church and a fellowship hall planned, it concluded the development of the fellowship hall was not approved. Contrary to the Commission's finding, the master noted the fellowship hall was plainly and clearly shown on the development plat and included in the permit. The master decided the Commission had erroneously confused the development permit—which expressly encompassed the church, fellowship hall, and supporting infrastructure—with the construction permit, which was limited to the church and infrastructure. In addition, the master held the Commission erred in failing to find the Church's construction permit application was

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[3] During the hearing, the Church noted that prior to the ordinance's adoption, a county official assured the Church's pastor and building committee chairman that the ordinance would not affect its ability to complete development of the property under the existing development permit.

[4] The Church appealed the Commission's decision to the circuit court pursuant to S.C. Code Ann. section 6-29-1150 (2004 & Supp. 2019). Therefore, Judge Dukes was evidently sitting by designation as a special circuit court judge in this appeal.

[5] The United States of America intervened in the appeal before the master-in-equity in light of its federal interest in the proper application and enforcement of the airport overlay district ordinance, which was implemented to protect the public and the Marine Corps Air Station located in Beaufort County.

grandfathered because the development permit and plat included the fellowship hall. The master further disagreed with the Commission's finding that there was no evidence to support the continued validity of the original development permit, holding the evidence was undisputed that substantial improvement occurred within two years of the permit's issuance through completion of the church building as well as all infrastructure necessary to support both the church and the fellowship hall. Accordingly, the master concluded the original permit did not expire and directed the County to allow the Church to proceed with construction of the fellowship hall and complete development of its property.[6]

The County and the United States appealed the master's decision to the court of appeals, which reversed and reinstated the Planning Commission's decision. The court held the master erred in finding the Church's 1997 development permit applied to the construction of the fellowship hall because the permit had expired, as the improvements were directed only toward the construction of the church and parking area.[7] We granted the Church's petition for a writ of certiorari to review the court of

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[6] As an additional sustaining ground, the master held the Commission abused its discretion in refusing to issue a new development permit under the airport overlay district ordinance because there was no evidence to support the Commission's finding that the number of persons that could be on the site at any one time would be increased if the fellowship hall were allowed. The master noted a restriction could be placed on the new permit that the fellowship hall shall not be occupied at the same time as the sanctuary, and the restriction could be enforced in the same manner as any other zoning restriction. Importantly, the master held the Commission erred in adopting a definition of "occupancy load" not set forth in the ordinance but instead derived from the fire code, which defined the term as the maximum number of people allowed in a building without any consideration for the use to which the building will be put. Therefore, the master concluded the Commission abused its discretion in refusing to issue a new development permit.

[7] In addition, the court held the Commission properly denied the Church's application for a new development permit because the evidence supported the Commission's finding that construction of the fellowship hall would significantly increase the occupancy load of the site. The court relied on the meaning of "occupant load" in the fire code in finding the fellowship hall would "at least double the occupant load."

appeals' decision.

ISSUE PRESENTED

Did the court of appeals err in reversing the master's decision that the Church's original 1997 development permit included the fellowship hall and did not expire?[8]

STANDARD OF REVIEW

This Court will not reverse the findings of a county review board unless the board's findings have no evidentiary support or the board has committed an error of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). In the zoning context, a decision of the reviewing body will not be disturbed if there is evidence in the record to support its decision. *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). Indeed, we will not substitute our judgment for that of the reviewing body, even if we disagree with the decision. *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952). "However, the decision of the zoning board will not be upheld where it is based on errors of law . . . ." *Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953). Instead, "a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a

[8] The Church's petition also challenged the court of appeals' holding that, under the restrictions imposed by the airport overlay district ordinance, construction of the fellowship hall would increase the occupancy load of the site, and therefore, the Planning Commission properly denied its application for a new development permit. However, the Church was not required to request a new development permit governed by the ordinance's restrictions because we find the original 1997 development permit included the fellowship hall and did not expire. Because our determination concerning the validity of the original permit resolves this case, we need not address this issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when disposition of a prior issue is dispositive). We leave for another day the interpretation of Beaufort County's airport overlay district ordinance regarding nonconforming uses and the meaning of "occupant load" in this context.

lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

DISCUSSION

The Church argues the court of appeals erred in finding its original 1997 development permit did not apply to the construction of the fellowship hall because the permit had expired. The Church contends the court erroneously held the original development permit did not include the fellowship hall and that the improvements were directed only toward the construction of the church and parking area. Instead, the Church claims the master-in-equity correctly held the development permit and plat clearly and plainly included both the church and the fellowship hall, and substantial improvement occurred within two years of the permit's issuance because the church building and all infrastructure to support both buildings was completed.

In contrast, the County contends the Church was required to apply for a new development permit because its original permit only approved the development of a 15,872 square foot church building. In support of this contention, the County relies on the fact that the square footage of the proposed church is indicated on a document in the record the County alleges is part of the permit application, which is almost entirely indecipherable, presumably because it was copied from microfilm. We agree with the Church that the fellowship hall was also approved for development in the original permit. In our view, the County completely overlooks the fact that the permit itself approved development of the Church's entire 9.35 acre property as depicted in the plat and that the narrative included in the permit application described both the church and the fellowship hall.

The County further claims that even if the Church had requested a construction permit for the fellowship hall immediately following the issuance of the original development permit, it still would have been required to apply for another development permit for the fellowship hall because it was not included in the original permit. We cannot accept this interpretation of the original permit because it is belied by the record on appeal. Instead, we hold the fellowship hall was included in the original permit and approved for development because it is clearly and plainly shown in the permit application and plat.

The County also argues the original permit expired when the certificate of compliance was issued because the certificate effectively "closed out" the development permit—despite the fact that the permit itself indicates that it remains

valid if substantial improvement has occurred within two years of its issuance. This argument is unavailing. The certificate of compliance does not state that its issuance serves to close out the development permit. We note the County asserted at oral argument that while the certificate does not explicitly state that it does so, that is the effect of the document. The County was unable to cite anything in the record or reference any provision of law or written department procedure to support this contention; instead, counsel simply stated, "That's the procedure in the planning department, the planning world." We reject the County's argument that the certificate of compliance closed out the development permit merely based on "planning department procedure."

In addition, both the County and the court of appeals rely on *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986) and *F.B.R. Investors v. County of Charleston*, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991) to support the conclusion that the original development permit had expired, and a construction permit for the fellowship hall could not be issued based on that permit. We disagree with the court's application of those cases and find they are distinguishable.

In *Friarsgate*, the builder decided to develop condominiums as two separate projects—the first five units and then the remaining eleven units—because the development was contingent on the financial success of the first units. 290 S.C. at 272, 349 S.E.2d at 895. Indeed, the court noted, "[i]f the market response to the first units was poor, the project would not be completed. Thus, at the time the zoning ordinance was enacted, Friarsgate had no firm commitment to build the project." *Id*. Based on these facts, the court held Friarsgate did not have a vested right to complete the second project. *Id*. at 272-73, 349 S.E.2d at 895. Similarly, in *F.B.R. Investors*, the builder decided to develop the tract in two phases, constructing twenty-five duplexes on one parcel during Phase I and additional multi-family dwellings on the remaining parcel during Phase II. 303 S.C. at 526, 402 S.E.2d at 190. The court found all substantial expenditures and efforts had been made toward the construction and completion of Phase I and that "Phase II was essentially barren land when the zoning change occurred." *Id*. at 527, 402 S.E.2d at 191. As a result, the court held the investors did not establish a vested right to complete Phase II. *Id*. The court's decisions in *Friarsgate* and *F.B.R. Investors* derived from trial court determinations that the landowner had acquired a vested right to complete development prior to the enactment of a zoning ordinance. In contrast, there was no vested rights determination made in this case, and this issue was not timely raised by any party to

the litigation.[9] Therefore, the vested rights principles applied in those cases do not apply here.[10]

Moreover, the Church's development permit application contemplated phased *construction* of two buildings, not phased *development*. Contrary to the facts in

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[9] The County raised the issue of vested rights in its motion to reconsider the master's final order, arguing his decision amounted to a vested rights determination and was error in light of the fact that the Church did not pursue any claim under the Vested Rights Act, S.C. Code Ann. sections 6-29-1510 to -1560 (Supp. 2019). The master noted the issue was not raised until after the case had already been tried and a final order was entered, and therefore, the County's contention was not timely. *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). Regardless, the master held the Vested Rights Act did not affect the decision of this case because the Act went into effect on July 1, 2005—eight years after the development permit's issuance in 1997. The master also noted that, contrary to the County's argument, the purpose of the Act was to protect, preserve, and create vested rights in development permits. *See* H.R. 3858, 2003-2004 Gen. Assemb., 115th Sess. (S.C. 2004). Accordingly, the master determined, and we agree, that the Act did not empower the County to rescind or revoke the development permit which it had already issued to the Church.

[10] To the extent our jurisprudence on the common law doctrine of vested property rights does apply to this case, we find the Church was permitted to continue its nonconforming use and to construct the fellowship hall at the time the ordinance was enacted because the fellowship hall was included in the original development permit which did not expire. *See Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 498, 536 S.E.2d 892, 901 (Ct. App. 2000) ("A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare."). We also hold the fellowship hall was not a "mere contemplated use" but instead a planned addition to the existing sanctuary and approved by the County in the original development permit. *But cf. Lake Frances Props. v. City of Charleston*, 349 S.C. 118, 124-25, 561 S.E.2d 627, 631 (Ct. App. 2002) ("[T]he mere contemplated use of property by a landowner on the date a zoning ordinance becomes effective precluding such use is not protected as a nonconforming use.").

Friarsgate, we agree with the master-in-equity that the Church sought a permit for the development of one, unified project—the church and the fellowship hall as shown in the plat. In addition, unlike *F.B.R. Investors*, the Church made substantial improvements toward both the construction of the church as well as the proposed construction of the fellowship hall. The Church paved roadways, constructed all of the parking, and installed storm water management, septic tanks, and drain fields for both buildings. Therefore, we find the court of appeals' reliance on *Friarsgate* and *F.B.R. Investors* misplaced, as those cases are inapplicable to the facts of this case.

We agree with the master-in-equity that the Planning Commission erred in finding that the Church's original 1997 development permit did not authorize the development of the fellowship hall because the proposed building was clearly indicated in the permit application and plat. There is no evidence in the record to support the Commission's finding that the original permit only authorized development of the church and that the certificate of compliance closed out the 1997 development permit. Consequently, the County erred in requiring the Church to request a new development permit. We also find the court of appeals erred in holding the original permit expired because substantial improvement occurred within two years of the permit's issuance, and the improvements were directed toward the construction of both the church and the fellowship hall. Therefore, we hold the Church's original development permit remains valid, and the County must issue the Church a construction permit for the fellowship hall under the original development permit and plat. The construction permit for the fellowship hall is grandfathered by virtue of the continued validity of the original development permit and is therefore not subject to the airport overlay district ordinance restrictions. Because our decision regarding the validity of the original development permit resolves this case, we need not determine whether the court of appeals erred in affirming the Commission's denial of the Church's application for a new development permit. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and order Beaufort County to issue Grays Hill Baptist Church a construction permit to build the fellowship hall in accordance with the plat submitted under its original 1997 development permit.

REVERSED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I believe there is evidence in the record to support the Beaufort County Planning Commission's determination the original development permit expired before the Church sought a construction permit for the fellowship hall. I also believe there is evidence in the record to support the Planning Commission's denial of a new development permit. While the Church makes a compelling case for lenience, our standard of review requires we defer to the Planning Commission, not to the circuit court. I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert G. Shirey, Respondent,

v.

Gwen G. Bishop, Cassandra Robinson, and TD Bank, N.A., Defendants,

Of whom Gwen G. Bishop and Cassandra Robinson are the Appellants.

Appellate Case No. 2017-001678

Appeal From Newberry County
Samuel M. Price, Jr., Special Referee

Opinion No. 5718
Heard February 3, 2020 – Filed April 22, 2020
Withdrawn, Substituted, and Refiled September 16, 2020

AFFIRMED

Jason Scott Luck, of Garrett Law Offices, of North Charleston, for Appellants.

Kyle B. Parker, of Pope Parker Jenkins, P.A., of Newberry, for Respondent.

GEATHERS, J.: In this land-transaction dispute, Appellants Gwen G. Bishop and Cassandra Robinson (collectively "Appellants") challenge the order of the special

referee, arguing that the referee erred in (1) finding Respondent Robert G. Shirey was entitled to specific performance; (2) setting aside the deed from Bishop to Robinson; (3) finding Shirey to be a bona fide purchaser; and (4) awarding Shirey attorney's fees. We affirm.

FACTS

The property at issue in this case is located at 242 Power Station Road in Newberry County, tax map number 294-23 ("the Property"). For over thirty years, Bishop and her husband operated a grave digging and burial vault business from the Property. In 2010, Bishop's husband passed away, leaving Bishop to run the business by herself. Consequently, Bishop suffered from depression and anxiety and she ultimately determined that she did not want to continue operating the business.

On April 25, 2012, Bishop entered into a land sale contract with Robinson, her niece, to sell the Property ("the 2012 Robinson Contract"). Robinson agreed to purchase the Property by assuming Bishop's mortgage and making monthly payments in the amount of $2,080.77 until the mortgage was satisfied.[1] The contract provided that, "If Buyer does not pay payments on the note monthly, Seller has the right to declare Buyer in default of this Contract." The contract was never recorded.

In many ways this case arises out of what happened next. Although Bishop had agreed in 2012 to sell the Property to Robinson, sometime in late 2014 or early 2015, Bishop approached Shirey about purchasing the Property[2] and the two ultimately entered into a land sale contract on May 20, 2015 ("the Shirey Contract"). Shirey agreed to purchase the Property for $125,000 and tender earnest money in the amount of $1,000 to be paid upon the signing of the contract. The contract also included (1) a provision requiring that the closing occur "no earlier than August 3, 2015[,] and no later than August 12, 2015," further indicating that time was of the essence; (2) a warranty provision representing that Bishop "ha[d] good and marketable fee simple title to the Property . . . and no person or entity claim[ed] any right of possession to all or any portion thereof . . ."; and (3) a provision requiring (a) a specific writing for the waiver of any provision and (b) a writing signed by both parties for any modification.

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[1] TD Bank, the mortgagee, was not notified and did not consent to the assumption.

[2] Shirey owns two commercial parcels that bound the Property on two sides.

Shirey tendered a check for $122,976.92 and deposited it with his attorney's office on August 12, 2015. However, Bishop did not show up to the closing or otherwise tender a deed to Shirey. After it became apparent that Bishop was not going to appear, Shirey's attorney called Bishop to ask if the closing period could be extended to August 13, 2015, and Bishop agreed to appear the next day for closing.

On August 13, 2015, Shirey arrived at his attorney's office but Bishop again failed to appear. Later that morning, Bishop's doctor sent a note to Shirey's attorney asking that Bishop be excused from the closing. However, that afternoon, Bishop entered into a second land sale contract with Robinson ("the 2015 Robinson Contract"). Pursuant to the contract, Robinson agreed to purchase the Property for $33,000[3] and assume the mortgage. Notably, the 2015 Robinson Contract included a provision absent from the 2012 Robinson Contract providing that "The seller also[] agrees to indemnify the Buyer of any and all issues and of illegality or fraud concerning this transaction." Additionally, Bishop executed a deed conveying the Property to Robinson, and Robinson recorded the deed the same day.

Shirey filed a complaint against Bishop on August 20, 2015, requesting specific performance of the Shirey Contract and attorney's fees. Bishop filed her answer on September 16, 2015. On October 8, 2015, after learning of the deed from Bishop to Robinson, Shirey filed a motion to amend his complaint to add TD Bank and Robinson as parties to the action. The motion was granted, and Shirey filed his amended complaint on February 16, 2016. TD Bank filed its answer on April 7, 2016, and Bishop and Robinson both filed their answers on April 25, 2016. Neither Bishop nor Robinson raised any affirmative defenses in their answers.

On February 23, 2017, the action was referred to the special referee, and the case was heard on March 22, 2017. The parties offered records, depositions, and testimony demonstrating that Robinson did not make all of the mortgage payments required by the 2012 Robinson Contract,[4] she made sixteen late payments, and she knew about the Shirey Contract prior to August 13, 2015, the date of the Shirey closing. Additionally, Bishop testified that she forwarded all of her mortgage

[3] Robinson testified that the $33,000 purchase price was equal to the amount of mortgage payments she had made under the 2012 Robinson Contract.

[4] Bishop resumed making the mortgage payments after Robinson made her last payment in August 2013. Appellants testified that these payments served as Bishop's rent for occupying the premises, but such an agreement was never reduced to writing.

statements to Robinson and did not understand what she was signing when she signed the 2015 Robinson Contract.

On May 18, 2017, the special referee entered an order in favor of Shirey, setting aside the deed to Robinson, ordering specific performance of the Shirey Contract, and awarding Shirey attorney's fees. The special referee further determined that (1) Shirey was a bona fide purchaser who took free of any interest Robinson might have in the Property; (2) Robinson and Bishop were in a confidential relationship; (3) the phone call from Shirey's attorney to Bishop was tantamount to an extension of the contract; and (4) Bishop's entering into the Shirey Contract demonstrated an intention to hold Robinson in default of the 2012 Robinson Contract. Appellants filed a motion for reconsideration, which was denied by the special referee on July 28, 2017. This appeal followed.

ISSUES ON APPEAL

1. Did the special referee err in finding that Shirey was entitled to specific performance?

2. Did the special referee err in setting aside the deed from Bishop to Robinson?

3. Did the special referee err in finding Shirey to be a bona fide purchaser?

4. Did the special referee err in awarding Shirey attorney's fees?

STANDARD OF REVIEW

An action for specific performance and an action to set aside a deed are both matters in equity. *Bullard v. Crawley*, 294 S.C. 276, 278, 363 S.E.2d 897, 898 (1987); *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004). "In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence." *Greer v. Spartanburg Tech. Coll.*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). However, "[t]his broad scope of review does not require this court to ignore the findings below when the [referee] was in a better position to evaluate the credibility of the witnesses." *Id*.

"The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard." *Raynor v. Byers*, 422 S.C. 128, 131, 810 S.E.2d 430,

432 (Ct. App. 2017) (quoting *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009)).

LAW/ANALYSIS

I. Specific Performance

Generally, "[s]pecific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Campbell*, 361 S.C. at 263, 603 S.E.2d at 627 (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)). However, "[w]hen land is the subject matter of an agreement[,] the jurisdiction of equity to enforce specific performance is undisputed[] and does not depend on the inadequacy of the legal remedy in the particular case." *Adams v. Willis*, 225 S.C. 518, 526, 83 S.E.2d 171, 175 (1954); *see also Belin v. Stikeleather*, 232 S.C. 116, 123, 101 S.E.2d 185, 188 (1957) ("It is elementary that the jurisdiction of equity to grant specific performance of an agreement of this kind does not depend upon the inadequacy of the legal remedy in the particular case."). "Equity will not decree specific performance unless the contract is fair, just, and equitable." *Campbell*, 361 S.C. at 263, 603 S.E.2d at 627. Accordingly, "specific performance of a contract to sell real property will be ordered whe[n] the contract 'is fair and was entered into openly and aboveboard.'" *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) (quoting *Adams*, 225 S.C. at 528, 83 S.E.2d at 176).

> In order to compel specific performance, a court of equity must find: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract.

Gibson v. Hrysikos, 293 S.C. 8, 13–14, 358 S.E.2d 173, 176 (Ct. App. 1987).

Appellants argue the special referee erred in granting Shirey specific performance because (1) there was no valid contract as Shirey breached the contract and the oral extension of the closing date was ineffective under the statute of frauds; (2) the equities of the transaction did not favor specific performance; and (3) Shirey

has not demonstrated that he was capable of performing the contract at the time of filing.[5] We will address each argument in turn.

a. Contract validity and the statute of frauds

Appellants argue Shirey is not entitled to specific performance because the Shirey Contract was no longer valid after Shirey breached by asking Bishop to close on the day after the initial closing date. Shirey argues he did not breach the Shirey Contract because the contract was orally extended. We agree with Shirey.

Appellants argue the oral modification of the Shirey Contract's closing date was ineffective under the statute of frauds.[6] Shirey argues Appellants waived this argument by failing to plead it in their answers. We agree with Shirey.

The statute of frauds is an affirmative defense that must be set forth in the responsive pleading of the party seeking its protection. *See* Rule 8(c), SCRCP ("In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . statute of frauds . . . ."); *Am. Wholesale Corp. v. Mauldin*, 128 S.C. 241, 243, 122 S.E. 576, 576 (1924) ("[T]he party seeking the protection of the statute of frauds must plead it."); *Parker v. Shecut*, 340 S.C. 460, 489, 531 S.E.2d 546, 561 (Ct. App. 2000) ("Affirmative defenses, such as the statute of frauds, must be set

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[5] Appellants also argue that Robinson is entitled to the Property under the 2012 Robinson Contract because Bishop never held her in default for late or missed payments. We find the referee properly determined that Bishop's act of entering into the Shirey Contract evinced her intent to hold Robinson in default of the 2012 Robinson Contract. *Cf. Masonic Temple v. Ebert*, 199 S.C. 5, 16, 18 S.E.2d 584, 589 (1942) ("[T]he law does not require a notice of withdrawal of an offer to be in any particular form."); *id*. ("[I]t [is] sufficient that the [offeror] does some act inconsistent with it[] and the [offeree] has knowledge of such act." (citation omitted)). Accordingly, the referee properly determined that Robinson was not entitled to the Property under the 2012 Robinson Contract. *See Davis v. Monteith*, 289 S.C. 176, 345 S.E.2d 724 (1986) (finding a purchaser who failed to perform under the land sale contract had "no legal right to the property").

[6] Appellants also argue the oral modification is ineffective because the Shirey Contract required that all modifications be in writing. This argument is without merit. *See ESA Servs., LLC. v. S.C. Dep't of Rev.*, 392 S.C. 11, 23, 707 S.E.2d 431, 438 (Ct. App. 2011) ("Written contracts may be orally modified by the parties, even if the writing itself prohibits oral modification.").

forth in a responsive pleading."), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

Here, neither appellant pleaded the statute of frauds in their answers to Shirey's amended complaint, nor did Bishop plead the statute of frauds in her answer to Shirey's original complaint. Moreover, neither appellant argued this issue while they were before the special referee. Therefore, we find Appellants have waived this defense by failing to include it in their responsive pleadings. *See Am. Wholesale Corp.*, 128 S.C. at 243, 122 S.E. at 576 ("[T]he party seeking the protection of the statute of frauds *must* plead it." (emphasis added)).

Appellants argue they did not waive the statute of frauds because it was tried by consent before the referee. We disagree.

"Generally, claims or defenses not presented in the pleadings will not be considered on appeal." *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002). However, pursuant to Rule 15(b), SCRCP, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." "In order to be tried by implied consent, the issue must have been discussed *extensively* at trial." *Fraternal Order of Police*, 352 S.C. at 435, 574 S.E.2d at 725 (emphasis added). In many cases, "[i]f neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to the trial of such issues." *Woods v. Rabon*, 295 S.C. 343, 347, 368 S.E.2d 471, 474 (Ct. App. 1988). Crucially, however, appellate courts "*will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment*." *Dunbar v. Carlson*, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct. App. 2000) (quoting *Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App. 1994)); *see, e.g.*, *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (finding the issue of estoppel was not tried by consent because the evidence presented also supported the appellants' breach of contract accompanied by a fraudulent act claim).

Appellants assert the statute of frauds defense was tried by consent because Appellants asserted the statute of frauds by name at trial, Appellants offered trial and deposition testimony supporting the defense, and the special referee specifically addressed the statute of frauds in its final order and its order denying Appellants' motion to reconsider. We address each assertion in turn.

First, Appellants claim that the statute of frauds was tried by consent because it was asserted by name at trial. During the cross-examination of Bishop, Appellants objected to a line of questioning "based on the statute of fraud[s]. . . ." However, Appellants did not assert the statute of frauds by name again while before the special referee. Moreover, the referee noted the objection and indicated that Shirey did not need to respond to it. Consequently, we do not find that a single reference to the statute of frauds in the context of an objection supports the conclusion that the issue was tried by consent. *See Fraternal Order of Police*, 352 S.C. at 435, 574 S.E.2d at 725 ("In order to be tried by implied consent, the issue must have been discussed *extensively* at trial." (emphasis added)).

Second, Appellants claim the statute of frauds was tried by consent because they offered trial and deposition testimony demonstrating that Shirey did not ask for an extension to the closing date in writing. However, this evidence was also relevant to Appellants' argument that the oral extension of the closing date was invalid because the Shirey Contract required that all modifications be in writing. In fact, while before the referee, Appellants' counsel presented Shirey with the provision requiring written modifications immediately after eliciting Shirey's concession that he did not ask for an extension in writing. Accordingly, we do not find that Shirey recognized the statute of frauds as an issue while before the referee. *See Dunbar*, 341 S.C. at 268, 533 S.E.2d at 917 ("*[Appellate courts] will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment*." (quoting *Williams*, 314 S.C. at 38, 443 S.E.2d at 584)).

Finally, Appellants argue that the statute of frauds was tried by consent because the referee specifically addressed it in his orders. However, Appellants' argument necessarily misconstrues the referee's findings. First, in his final order, the referee explained that Bishop was estopped from challenging the oral extension of the closing date because Shirey acted in detrimental reliance on the extension. The referee further explained, "This is true even where the Contract is within the statute of frauds." We do not find the referee's acknowledgement that estoppel would apply equally to a contract within the statute of frauds is tantamount to a finding that the Shirey Contract was within the statute of frauds. Similarly, in his order denying Appellants' motion to reconsider, the referee found that *if* a writing were required by the statute of frauds, Bishop's doctor's note would satisfy that

requirement. Again, the referee did not make any findings as to whether the Shirey Contract was within the statute of frauds.

We conclude the statute of frauds was not tried by consent because (1) the defense was referenced only once by name during the trial in the context of an objection; (2) evidence supporting the statute of frauds defense was also relevant to Appellants' argument that oral extension of the closing date violated the Shirey Contract's requirement that modifications be in writing; and (3) the special referee did not make any rulings as to whether the Shirey Contract was within the statute of frauds. Thus, because the statute of frauds was not raised in the pleadings or tried by consent, the issue was waived. *Cf. Fraternal Order of Police*, 352 S.C. at 435, 574 S.E.2d at 725 ("As the [issue] was not pleaded, discussed extensively at trial, or ruled upon by the trial judge, it is not preserved for review."). Accordingly, because Appellants have waived the statute of frauds, the oral extension of the closing date was effective. Thus, the Shirey Contract was still valid and enforceable on August 13, 2015. *See Gibson*, 293 S.C. at 13, 358 S.E.2d at 176 ("In order to compel specific performance, a court of equity must find . . . clear evidence of an agreement[.]").

b. Equities of the transaction

Appellants argue the special referee erred in granting specific performance because the equities of the transaction do not favor such relief. At the outset, Shirey argues this issue has not been preserved for appellate review because it was not raised to and ruled upon by the special referee. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Appellants argue that they were not required to preserve the issue because, in seeking specific performance, the burden of proof was on Shirey to demonstrate that the transaction was equitable by a preponderance of the evidence. *See Campbell*, 361 S.C. at 263, 603 S.E.2d at 627 ("Specific performance should be granted only if there is no adequate remedy at law *and specific enforcement of the contract is equitable between the parties*." (emphasis added) (quoting *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291)). Thus, in determining that Shirey was entitled to specific performance, the special referee necessarily determined that equity supported its application. Therefore, Appellants argue this court's *de novo* review of the referee's grant of specific performance must include a consideration of the equitable circumstances involved. *See Greer*, 338 S.C. at 79, 524 S.E.2d at 858 ("In reviewing a proceeding in equity, this court may find facts

based on its own view of the preponderance of the evidence."). We agree with Appellants.

"Specific performance will not be ordered unless the contract expresses the true intent of the parties and is *fair, just and equitable*." *Amick*, 286 S.C. at 484, 334 S.E.2d at 527 (emphasis added); *see also Campbell*, 361 S.C. at 263, 603 S.E.2d at 627 ("Specific performance should be granted only if there is no adequate remedy at law *and specific enforcement of the contract is equitable between the parties*." (emphasis added) (quoting *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291)).

Appellants argue that equity favors them because (1) Shirey was a more sophisticated businessperson than Bishop; (2) Bishop struggled with mental health issues while Shirey did not; (3) Shirey exerted undue influence over Bishop because Bishop signed the Shirey Contract at Shirey's attorney's office, without witnesses, and without representation; and (4) certain provisions of the Shirey Contract inured to Shirey's benefit, including the requirement that Shirey pay an earnest money deposit of .8% rather than the customary 1%. However, in considering the equities, Appellants fail to consider that Bishop is the one who approached Shirey about selling the Property.

Moreover, Appellants' argument necessarily relies on this court turning a blind eye to Robinson. Notably, Appellants address only the equities between Shirey and Bishop but do not contend that equity requires the denial of specific performance in favor of Bishop's retention of the Property. Rather, Appellants contend that equity requires the denial of specific performance in favor of Robinson's acquisition of the property. In other words, Appellants assert the equitable result is the transfer of the Property to Robinson instead of Shirey. *See Ingram*, 340 S.C. at 107, 531 S.E.2d at 291 ("[Sh]e who seeks equity must do equity" (quoting *Norton v. Matthews*, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967))). Accordingly, we consider the equities involved amongst all three parties.

Turning to the equities between Bishop and Robinson, the record reveals that (1) Bishop struggled with mental health issues while Robinson did not; (2) Robinson failed to make timely payments on Bishop's mortgage as required by the 2012 Robinson Contract; (3) Robinson paid $33,000 out of the $85,311.57 she was obligated to pay on Bishop's mortgage under the 2012 Robinson Contract; (4) after Robinson made her last payment on Bishop's mortgage in 2013, Bishop resumed making her own mortgage payments; (5) Robinson convinced Bishop to forego the Shirey Contract and enter into the 2015 Robinson Contract; (6) Robinson drafted the

2015 Robinson Contract and deed; (7) Bishop did not seek the advice of counsel before signing the 2015 Robinson Contract and deed; (8) Bishop indicated she was so distraught on August 13, 2015, that she did not know what she was signing when she signed the 2015 Robinson Contract and the deed; and (9) Robinson included a provision in the 2015 Robinson Contract that did not appear in the 2012 Robinson Contract that required Bishop to indemnify Robinson "of any and all issues and of illegality or fraud concerning this transaction."

Turning to the equities between Shirey and Robinson, the record reveals that (1) Shirey was not aware that Bishop and Robinson had previously entered into the 2012 Robinson Contract when he entered into the Shirey Contract; (2) Robinson was aware that Bishop and Shirey had entered into the Shirey Contract; (3) Robinson convinced Bishop to forego the Shirey Contract and enter into the 2015 Robinson Contract; and (4) Robinson included a provision that required Bishop to indemnify Robinson from any and all issues arising out of illegality or fraud concerning the transaction.

After analyzing the equities involved amongst all three parties, we find the equities favor granting specific performance of the Shirey Contract. Robinson was clearly the party most capable of protecting herself and avoiding the controversy at bar. Robinson knew of the Shirey Contract before convincing Bishop to enter into the 2015 Robinson Contract. Despite this knowledge, Robinson did not approach Shirey or otherwise notify him that she believed she possessed a competing interest in the Property. Instead, Robinson privately convinced Bishop to forego her obligations under the Shirey Contract and sign the 2015 Robinson Contract. Moreover, while Appellants argue that Shirey took advantage of Bishop's mental health issues, the record reveals that it is Robinson who seemingly took advantage of Bishop. Notably, Bishop indicated that she was so distraught during the time Robinson convinced her to forego the Shirey Contract and enter the 2015 Robinson Contract that she did not understand what she was signing when she signed the 2015 Robinson Contract and the deed to the Property. Accordingly, Bishop's testimony leads to the conclusion that Bishop did not understand the fraud indemnity provision that Robinson included in the 2015 Robinson Contract. This provision, which was not included in the 2012 Robinson Contract, is seemingly designed to protect Robinson from any liability stemming from her role in procuring Bishop's breach of the Shirey Contract by shifting all potential liability from the breach solely to Bishop. Therefore, if specific performance of the Shirey Contract were not granted, Shirey would lose the benefit of the Shirey Contract despite fully performing his

obligations, Bishop would be subject to liability for breach of contract but still lose the Property, and Robinson would take the Property without consequence. This is not an equitable result. Rather, we find equity supports the transfer of the Property to Shirey, the transfer of the purchase price to Bishop, and the denial of any reward to Robinson for her role in procuring Bishop's breach of the Shirey Contract. In other words, equity supports the application of specific performance.

c. Capability of performing

Appellants argue the referee erred in granting specific performance because Shirey did not demonstrate that he was capable of performing his obligations under the contract both at the closing and at the time of the action. Shirey argues specific performance was justified because he fulfilled his obligations under the contract by tendering the purchase price on August 12, 2015. We agree with Shirey.

"In order to compel specific performance, a court of equity must find . . . that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." *Gibson*, 293 S.C. at 13–14, 358 S.E.2d at 176. Here, the record indicates that Shirey was required to tender earnest money and the purchase price under the Shirey Contract.[7] Shirey tendered the earnest money on May 20, 2015. Shirey then deposited the purchase price with his attorney's office on August 12, 2015. Accordingly, the special referee correctly found that Shirey timely complied with his obligations under the Shirey Contract. The record also shows that upon receipt of a payoff quote for the TD Bank mortgage, Shirey's attorney intended to transfer the purchase price to Bishop in exchange for a deed to the Property. Thus, there is evidence in the record demonstrating that Shirey has partially performed his obligations under the Shirey Contract and remains ready, willing, and able to complete performance of his part of the contract.

Based on the foregoing, there is evidence demonstrating (1) a valid agreement; (2) that Shirey partially performed his part of the contract with Bishop's consent; and

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[7] Appellants also argue that Shirey was incapable of performing because there is no evidence that his title insurer was prepared to deliver a title policy on August 12 or August 13. This argument is not preserved for appellate review because it was not raised to and ruled upon by the special referee. *See Pye*, 369 S.C. at 564, 633 S.E.2d at 510 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

(3) that Shirey remains ready, willing, and able to complete performance and purchase the Property. *See Gibson*, 293 S.C. at 13–14, 358 S.E.2d at 176 ("In order to compel specific performance, a court of equity must find: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract."); *see also Clardy v. Bodolosky*, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) ("We find the Clardys satisfied the elements of [specific performance]; there is evidence of a valid agreement, the Clardys performed their part of the contract with Bodolosky's consent, and the Clardys remain able and willing to buy the real estate."). Accordingly, we affirm the special referee's grant of specific performance.

II. Setting aside the deed

Appellants argue the special referee erred in setting aside the deed to Robinson because Robinson and Bishop were not in a confidential relationship and there was no evidence of undue influence. Shirey argues the referee's order should be affirmed under Rule 220(c), SCACR because the cancellation of a deed is the proper remedy when a purchaser is entitled to specific performance of a contract to sell land and the seller has conveyed the land to a third party with notice of the purchaser's claim.[8]

Appellants also argue the special referee erred in setting aside the deed after determining Robinson and Bishop were in a confidential relationship because mere familial relationships are inadequate to establish a confidential relationship.[9] We disagree.

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[8] Because we find that the referee's ruling was proper, we decline to address Shirey's alternative sustaining ground. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (indicating that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

[9] Appellants further argue this court must rule in their favor on this issue because Shirey did not respond to their argument in his brief, citing *Turner v. S.C. Dep't of Health and Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008), for the same proposition. However, the opinion plainly states the appellate court *may* treat the failure to respond as a confession that the appellant's position is correct. We decline to do so here as the referee's ruling was proper.

"A deed regular and valid on its face raises a presumption of validity." *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). However, "[o]nce a confidential relationship is shown, the deed is presumed invalid." *Bullard*, 294 S.C. at 280, 363 S.E.2d at 900. "A [confidential] relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption." *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138.

"A confidential relationship arises when the grantor has placed his trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." *Brooks v. Kay*, 339 S.C. 479, 488, 530 S.E.2d 120, 125 (2000). A confidential relationship does not arise based merely on a family relationship, friendship, or confidence and affection. *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138–39; *Brooks*, 339 S.C. at 488, 530 S.E.2d at 125. Rather, "[t]he essence of the relationship is the trust and confidence." *Brooks*, 339 S.C. at 488, 530 S.E.2d at 125. Thus, "[s]ome evidence is required that the grantor actually reposed trust in the grantee in the handling of her affairs." *Id*.; *see also Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990).

In *Dixon v. Dixon*, our supreme court determined that a mother and son were in a confidential relationship after considering the following factors: (1) the parties were related; (2) the mother gave her son a limited power of attorney; (3) after a deed from the mother to the son was recorded, they opened up a joint bank account consisting entirely of the mother's money; (4) the son prepared all of the documents in question, including the deed; and (5) the mother signed the documents without first consulting an attorney. 362 S.C. 388, 398, 608 S.E.2d 849, 853–54 (2005). The court further explained that while "a familial relationship, alone, is [not] sufficient evidence of a confidential relationship, a familial relationship certainly *supports* an argument that a confidential relationship exists." *Id*. at 398, 608 S.E.2d at 853 (footnote omitted).

The case at bar is strikingly similar to the mother-son relationship in *Dixon*. First, Bishop is Robinson's aunt, and the two admitted that they frequently talk and visit with each other. *See id*. ("[A] familial relationship certainly *supports* an argument that a confidential relationship exists."). Second, Bishop testified that she forwarded all of the TD Bank statements to Robinson when Robinson was making the payments, but did not check to ensure that Robinson was making the payments. Third, Robinson prepared the deed and 2015 Robinson Contract. Fourth, Bishop

signed the deed and 2015 Robinson Contract without first consulting an attorney. Fifth, Bishop indicated that she was so distraught on August 13, 2015, that she did not understand what she was signing when she entered into the 2015 Robinson Contract and deed. Finally, Robinson included a provision in the 2015 Robinson Contract that required Bishop to indemnify Robinson in the event of any fraud or illegality concerning the transaction.

Given these facts, we find that Bishop and Robinson were in a confidential relationship. That Bishop reposed trust in Robinson is apparent from the record, as she did not hesitate to sign the land sale documents that Robinson prepared despite the fact that she did not understand what she was signing. Moreover, the fact that Robinson included an indemnity clause in the 2015 Robinson Contract, which she drafted and Bishop did not understand, is demonstrative of the concerns our courts have regarding land transactions between individuals in a confidential relationship. The indemnity provision is seemingly designed so that Bishop assumed all of the potential liability stemming from the breach of the Shirey Contract. However, under the 2015 Robinson Contract, Bishop did not receive anything that she did not receive in the 2012 Robinson Contract by agreeing to indemnify Robinson. As such, it appears Bishop signed a contract that she did not understand was not in her best interests, without consulting an attorney, because she trusted Robinson. *See Brooks*, 339 S.C. at 488, 530 S.E.2d at 125 ("Some evidence is required that the grantor actually reposed trust in the grantee in the handling of her affairs."). Thus, the special referee did not err in finding that Robinson and Bishop were in a confidential relationship. Further, Robinson did not rebut the presumption of undue influence that arose from the evidence showing a confidential relationship. *See Bullard*, 294 S.C. at 280, 363 S.E.2d at 900 ("Once a confidential relationship is shown, the deed is presumed invalid."); *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138 ("A [confidential] relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption."). Therefore, the referee properly set aside the deed.

III. Equitable interests and bona fide purchasers

Appellants argue that if Shirey is entitled to specific performance, the special referee erred in determining the conveyance was not subject to Robinson's equitable interest in the Property. Shirey argues the referee properly determined that Shirey, as a bona fide purchaser, took the Property free of Robinson's equitable interest. We agree with Shirey.

"The general rule is that a purchaser of land takes subject to outstanding equitable interests in the property [that] are enforceable against him to the same extent they are enforceable against the seller[] whe[n] the purchaser is not entitled to protection as a bona fide purchaser." *Smith v. McClam*, 289 S.C. 452, 458, 346 S.E.2d 720, 724 (1986).

> To claim the status of a bona fide purchaser, a party must show (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, 'i.e., in good faith and with integrity of dealing, without notice of a lien or defect.'

Robinson v. Estate of Harris, 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006)). "The bona fide purchaser must show all three conditions . . . occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property." *Spence*, 368 S.C. at 117, 628 S.E.2d at 875.

Here, Shirey tendered the purchase price for the Property on August 12, 2015. Moreover, the record reveals that Shirey did not have notice of Robinson's claims to the Property before entering into the Shirey Contract, tendering the purchase price, or filing the action at bar. In fact, the Shirey Contract included a warranty provision indicating that no other person or entity had an interest in or claimed possession of the Property. Thus, whether Shirey is a bona fide purchaser will turn on whether he acquired title to the Property or had "the best right to it."

Robinson argues that Shirey is not a bona fide purchaser because he now has notice of Robinson's claims to the Property and has not yet acquired title. However, it would not be equitable to allow Robinson's interference with the Shirey Contract to defeat Shirey's status as a bona fide purchaser. By allowing Robinson to maintain an equitable interest in the Property after procuring Bishop's breach of the Shirey Contract, this court would be sanctioning, if not rewarding, Robinson's misconduct. Furthermore, a purchaser does not have to actually acquire the title before receiving notice of any outstanding encumbrances or equities in the property in order to be deemed a bona fide purchaser. Rather, our courts have indicated that a party may acquire bona fide purchaser status if the party acquires "the best right to" the title before receiving notice of any outstanding encumbrances or equities in the property. *See S.C. Tax Comm'n v. Belk*, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976)

(indicating the party seeking bona fide purchaser status must acquire the title, or best right to it, and pay the purchase price "before notice of outstanding [e]ncumbrances or equities"). As indicated in Section I, Shirey is entitled to specific performance of the Shirey Contract, which entitled him to take the Property upon tendering the purchase price. Consequently, we find that Shirey acquired the "best right to" the Property's title upon tendering the purchase price, which occurred before he learned of Robinson's interest in the Property. Accordingly, the special referee did not err in finding that Shirey was a bona fide purchaser and not subject to any equitable interest that Robinson may have in the Property.

IV. Attorney's fees

Appellants argue the special referee erred in awarding Shirey attorney's fees because Shirey breached the Shirey Contract first. Shirey argues the referee properly awarded him attorney's fees because the contract provided for attorney's fees and he was the prevailing party. We agree with Shirey.

"In South Carolina, the authority to award attorney's fees can come only from a statute or . . . the language of a contract. There is no common law right to recover attorney's fees." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238–39, 616 S.E.2d 431, 434 (Ct. App. 2005) (quoting *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001)).

Appellants do not challenge the reasonableness of the attorney's fees awarded to Shirey. Rather, Appellants argue that it is the Appellants, not Shirey, who are entitled to attorney's fees. In *Raynor*, this court held that the circuit court did not abuse its discretion in awarding attorney's fees where the contract at issue provided for attorney's fees. 422 S.C. at 132, 810 S.E.2d at 433. Like the case at bar, the appellants in *Raynor* argued the respondents were not entitled to attorney's fees but did not challenge the reasonableness of the attorney's fee award. *Id*. at 131, 810 S.E.2d at 432. This court determined that "[t]he contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation in the event of default." *Id*. at 132, 810 S.E.2d at 432–33. Accordingly, this court found that "the circuit court did not abuse its discretion because there was evidence to support its finding that the contract allowed for an award of attorney's fees." *Id*. at 132, 810 S.E.2d at 433.

Here, the contract provided that, "[i]n the event of any litigation between Buyer and Seller regarding this Contract, the losing party shall promptly pay the

prevailing party's attorneys' fees and expenses and costs of litigation." Accordingly, the contract clearly allows for the prevailing party to recover attorney's fees. Thus, because Shirey was the prevailing party, the special referee did not abuse his discretion in awarding Shirey attorney's fees. *See id*. ("[T]he circuit court did not abuse its discretion because there was evidence to support its finding that the contract allowed for an award of attorney's fees.").

CONCLUSION

Based on the foregoing, we affirm the special referee's order.

AFFIRMED.

LOCKEMY, C.J., and HEWITT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mack Seal Washington, Appellant.

Appellate Case No. 2017-001111

Appeal From Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5773
Heard September 16, 2019 – Filed September 16, 2020

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

HILL, J.: Mack Seal Washington appeals his convictions for first-degree burglary, malicious injury to property, and obtaining goods by false pretenses, arguing the trial court erred in admitting an audio recording of certain hearsay statements a police detective made while interrogating him. We agree this was error and reverse and remand for a new trial.

I. FACTS

On August 21, 2015, someone broke into a Johns Island home and stole several items, including a rifle and a Husqvarna weed eater. Police began focusing on Washington as a suspect when his fingerprints matched a latent print found on a washing machine at the burgled home. They later discovered that on the day of the burglary, Washington pawned a Winchester rifle at a pawnshop in North Charleston and a Husqvarna weed eater at a different branch of the same pawn shop. Washington was arrested on March 23, 2016, and Detective Timothy McCauley interviewed him the next day. After giving Washington *Miranda* warnings, McCauley began the interview, which largely consisted of McCauley asking Washington to explain how his fingerprints ended up at the crime scene and whether he could prove his innocence.

Before trial, Washington objected to the admissibility of the audio recording of the interview on three grounds: hearsay, improper bolstering of the State's fingerprint expert's testimony, and that it contained improper opinion evidence. The trial court excluded a few of McCauley's comments on bolstering grounds but admitted a redacted version of the audio. Listening to this redacted version, the jury heard McCauley make such comments to Washington as:

> "[C]an you explain why your fingerprints would have been inside the house?"
>
> "Were you on any kind of drugs or anything in any point of time back in the summer when you would have forgotten doing something? That might explain why you did it."
>
> "This is from the state law enforcement division where we send all our fingerprints . . . . It shows right here two fingerprints were taken. Identified as [Mack Seal] Washington with that specific state ID number which is assigned to you"
>
> "I'll call him [Washington's employer] up but how do you explain your fingerprints inside this man's house? . . . [T]here's no if, and, or buts about it"

> "[B]ut you can't be at work and your fingerprint be inside the house at the same time"
>
> "[T]hen how'd your fingerprint end up there?"
>
> "[Y]ou still have to explain why your fingerprints [are] in that man's house."
>
> "[W]ell then it still doesn't explain why your fingerprints are there and why you had a stolen gun, a stolen rifle. There was a second gun stolen, it was a pistol, which is why I think you're trying to put the story together of a person you ran into on Bees Ferry in the parking lot of Walmart. You're trying to put some story together to justify why you had access to those"
>
> "[Y]ou also pawned a weed eater . . . . I'm saying you pawned that same day, the same day you pawned that rifle at a different pawn shop which is what people do when they're trying to spread out stuff that's stolen."

In addition to McCauley's testimony, the State's case included the testimony of the victims and the responding officer, the fingerprint evidence, and evidence relating to pawn tickets. The jury convicted Washington on all counts.

II. HEARSAY

Detective McCauley's interrogation method may have been a proper investigative technique, but every word he uttered during the out of court interview was inadmissible hearsay. Any doubt about its inadmissibility was removed by *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), decided more than two years before Washington's trial. *Brewer* held a detective's statements and questions in a similar interview to be "unmistakable hearsay." 411 S.C. at 407, 768 S.E.2d at 659. Washington's statements during the interview are not hearsay because they are admissions of a party offered against that party. Rule 801(d)(2)(A), SCRE. Therefore, when McCauley testified, the State could have admitted Washington's statements by asking McCauley about them, avoiding the hearsay taint of McCauley's statements in the recording.

At the trial, the assistant solicitor contended McCauley's statements were not hearsay because they were not offered for their truth but to give Washington's answers "context." There is no "context" exception to the hearsay rule. *Brewer* rejected this same argument as "patently without merit," finding it had "no support in the law." *Id*. Undeterred, the State recycles the argument before us, still unaccompanied by any authority to support it. The statements were inadmissible hearsay, and we reverse the trial court's ruling admitting them.

III. BURDEN SHIFTING

As in *Brewer*, here there was no objection made to the recording on burden-shifting grounds. Nevertheless, as in *Brewer*, Detective McCauley's repeated requests that Washington explain why he was not guilty amounted to a "grave constitutional error." *Id*. at 408, 768 S.E.2d at 659. As Justice Kittredge so well put it, "Law enforcement's *ad nauseam* insistence that Brewer prove his innocence has *no* place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt." *Id*.

We respect our good dissenting colleague's contention that Washington did not adequately preserve his hearsay objection on appeal. We are convinced, though, that Washington preserved the hearsay issue given his specific hearsay objection to the trial court, and his extensive reliance on *Brewer* in his brief and at oral argument. *See* Toal et al., *Appellate Practice in South Carolina* 75 (3d ed. 2016) ("[W]here an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments."). While Washington may not have wrapped his issues up in a neat categorical box, we do not believe he abandoned the hearsay argument on appeal or that we should not address it. *See Calhoun v. Calhoun*, 339 S.C. 96, 105–06, 529 S.E.2d 14, 19–20 (2000) (holding a party did not limit claim by failing to use "transmutation" in her statement of issues on appeal where her argument discussed and cited to authority on transmutation); *Eubank v. Eubank*, 347 S.C. 367, 374 n.2, 555 S.E.2d 413, 417 (2001); cf. Rule 208(b)(1)(B), SCACR ("*Ordinarily*, no point will be considered which is not set forth in the statement of the issues on appeal.") (emphasis added).

The State did not raise preservation in its brief. In fact, it spent considerable time there and at oral argument claiming the recording is not hearsay. While we may invoke preservation rules on our own, we should not be quick to disturb the parties' silence. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323,

333, 730 S.E.2d 282, 287 (2012) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indication to the court of the obscurity of the purported procedural flaw.") (Toal, C.J., concurring).

IV. HARMLESS ERROR

The error was not harmless. *State v. Young*, 420 S.C. 608, 625, 803 S.E.2d 888, 897 (Ct. App. 2017) (providing improper admission of hearsay may be deemed harmless if it appears beyond a reasonable doubt it did not contribute to the verdict). In *Brewer*, the defendant was tried on charges related to two shootings occurring the same night. A majority of the court found the error harmless as to the charges related to the first shooting (which had numerous eyewitnesses to Brewer firing shots, a photograph of Brewer at the scene with a gun, and evidence of there being only one shooter), but not harmless as to the murder charge related to the second shooting (of which there was only "thin, circumstantial" evidence against Brewer, and testimony that at least two shooters were present). *Brewer*, 411 S.C. at 409–10, 768 S.E.2d at 660.

The prosecution's case against Washington was strong but circumstantial, led by the fingerprint evidence. The State acknowledges fingerprint evidence alone is often not enough to get a burglary case to a jury. *See State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016); *State v. Mitchell*, 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998). In its brief, the State argues it was important to present the recording of McCauley's interview of Washington because it allowed the State to bolster the fingerprint evidence and attack Washington's alibi in detail. The State explained the recording gave them the opportunity to do both, without which their case would have been, in their words, "vulnerable to a directed verdict."

Washington told Detective McCauley he was working at the time of the burglary, but the State called his employer, who testified they had no record of Washington's attendance at work that day. The pawn tickets were incriminating, but there was evidence the victim first described the missing rifle as a Savage, not a Winchester. The weed eater was sold before the victim could verify its identity.

The State highlighted the recorded interview in its closing, and the jury later interrupted its deliberations to ask for a transcript of the interview. The trial court sent the seventeen-minute recording back to the jury room. Twenty minutes later, the jury found Washington guilty. Under the circumstances, it appears to us that the

hearsay figured so prominently in Washington's trial that its "reverberating clang . . . would drown all weaker sounds." *Shepard v. United States*, 290 U.S. 96, 104 (1933) (Cardozo, J.). We are therefore sure erroneously admitted hearsay evidence contributed to the jury verdict and was not harmless.

REVERSED AND REMANDED.

LOCKEMY, C.J., concurs.

KONDUROS, J., dissenting: I respectfully dissent from my learned colleagues' opinion. While allowing Detective McCauley's statements made during his interrogation of Washington to be presented to the jury may have constituted a violation of *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), by possibly shifting the burden of proof, this issue is not preserved. As the majority acknowledges, Washington's objection to the statements did not concern an alleged burden shifting nor mention a *Brewer* violation. The majority points out the objection to burden shifting in *Brewer* was not preserved. However, in *Brewer*, the defendant objected at trial on the basis that the interrogator's statements were hearsay *and renewed this argument on appeal*. *Id.* at 406, 768 S.E.2d at 658. The supreme court found the "evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id.* at 406-07, 768 S.E.2d at 659.

In the present case, the majority finds, "The statements were inadmissible hearsay, and we reverse the trial court's ruling admitting them." However, Washington's *sole* issue on appeal is the inclusion of the statements shifted the burden of proof and constituted improper opinion evidence. While the argument section of Washington's brief includes a quote from *Brewer* that the statements in that case were hearsay, the section does not include any argument that Detective McCauley's statements constituted hearsay. The sole reference to the statements constituting hearsay is in the facts section of Washington's brief, stating, "When the officer discussed the pawn tickets, the officer's statements were hearsay and improperly bolstered the testimony of the pawn shop dealers." Accordingly, I do not believe Washington has sufficiently raised any argument regarding hearsay to this court. *See State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001))); *id.* ("An issue is also

deemed abandoned if the argument in the brief is merely conclusory." (quoting *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000))).

Because Washington has not raised the issue of hearsay to this court, I believe it is not properly before us and therefore, not appropriate for us to address on appeal. "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (alteration by court) (quoting *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985), *but cited with approval in Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991)). "The appellants have the responsibility to identify errors on appeal, not the [c]ourt." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001). Therefore, I disagree with the majority's reversing Washington's convictions on this basis.

Likewise, Washington's burden shifting argument is not preserved for our consideration. As previously discussed, Washington objected to the disputed statements on the grounds of hearsay and improper bolstering. During the pretrial hearing, Washington argued Detective McCauley "g[a]ve[] opinions as to the strength of the evidence in t[he] case." Washington further argued Detective McCauley repeatedly stated Washington's fingerprint was inside the home and noted the defense disputed this assertion. Washington also argued the disputed statements constituted hearsay and improper bolstering. In response, the State argued Detective McCauley's questions were not hearsay because they were not offered for the truth of the matter asserted and did not constitute bolstering but instead would provide context for the responses Washington gave during the interrogation. When the State moved at trial to admit the recording of Washington's interrogation, Washington simply indicated he had the same objection as he did pretrial. Washington never mentioned *Brewer* nor the more general argument of burden shifting.[1] Therefore, the issue was not raised to nor ruled upon by the trial court.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." *State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010). "Imposing this preservation requirement is meant to enable the trial court to rule properly after it

[1] The *Brewer* opinion was published January 28, 2015. Washington's trial took place over two years later on April 17-18, 2017.

has considered all the relevant facts, law, and arguments." *Id.* at 38, 698 S.E.2d at 242. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (citation omitted). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Because Washington never argued to the trial court that inclusion of the statements/questions by Detective McCauley improperly shifted the burden, I would find this issue unpreserved.

Even if the issues were preserved, I believe admission of Detective McCauley's statements constitutes harmless error in light of the other overwhelming evidence of Washington's guilt including the fingerprint evidence showing he had been inside the dwelling, the pawn tickets showing he was in possession of the stolen items on the day of the burglary, and his assertion of a spurious alibi. *See Brewer*, 411 S.C. at 408-09, 768 S.E.2d at 660 (holding the error in the admission of evidence in regards to certain charges was harmless in view of the overwhelming evidence of the defendant's guilt); *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence."); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))).

Further, in its opening and closing statements, the State acknowledged that it bore the entire burden to prove Washington guilty. The trial court issued similar admonishments in its jury charge.

Therefore, I would find the trial court did not abuse its discretion in admitting Detective McCauley's statements and would affirm Washington's convictions.